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# O’ODHAM NIOK? IN INDIGENOUS LANGUAGES, U.S. “JURISPRUDENCE” MEANS NOTHING

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**INTRODUCTION**

*O’odham Niok?* is a common phrase uttered by speakers of O’odham, a language in the Uto-Aztecan language family; a language spoken in communities from Central Arizona to Southern Durango, Mexico, covering a geography of 1200 miles.

On March 27, 2018 at 2:00 PM, a fifty-seven-year-old O’odham man arrived at the Tohono O’odham Reservation in Arizona from his O’odham community, Kom Wahia (*El Cumalito in Spanish*), in Sonora, Mexico. He crossed the international border on foot onto the Tohono O’odham Nation, the United States’ second largest reservation, and was arrested by Border Patrol at 3:00 PM. He left the reservation in the back of a Border Patrol vehicle and was deported to Nogales, Sonora, Mexico, 139 miles’ distance. He had never been to Nogales.

Despite the fact that he is a legal member of the Tohono O’odham Nation sanctioned by the Department of Interior’s Bureau of Indian Affairs, and that the Tohono O’odham Nation was recognized as an indigenous nation with limited sovereignty in 1917 by Executive Order,<sup>1</sup> at no time during his arrest, his transshipment, overnight stay in the Border Patrol Headquarters in Tucson, or his expulsion from the port of Nogales, Arizona on 29 March, 2018 into Mexico, did a single U.S. official speak to him in the only language he speaks: O’odham.

No interpreters were called to communicate with him. His controversial “illegal” entry charge aside,<sup>2</sup> as an O’odham, he acted as O’odham

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<sup>1</sup> It was originally called the Papago tribe, but it changed its name to its original language in 1986.

<sup>2</sup> Tohono O’odham have lived on both sides of the U.S.–Mexico border since 1852 with

have for at least the past 600 years in the Sonoran Desert: he traveled at will to visit relatives in other O'odham communities. His brother traveled in a like fashion from Kom Wahia toward Sells, Arizona the previous week, and was also expelled by U.S. officials. Without a phone, the fifty-seven-year-old monolingual O'odham speaker did not know, once he left his house, what had happened to his brother.<sup>3</sup>

Indigenous language exclusion is common practice in the U.S. immigration system; and that system begins at arrest long before an immigrant appears, if ever, in immigration court.

O'odham is but one of many indigenous languages spoken by migratory indigenous peoples entering what is now the United States of America. The commonly asserted strict definition of indigenous languages is languages of indigenous peoples who lived under colonialism. While many national languages were once indigenous languages of the ancestors of current day speakers, in the modern world, indigenous languages are most often minority languages in countries where indigenous peoples live under other language majorities.<sup>4</sup>

This Article attempts to outline major gaps in U.S. language policy affecting indigenous language speaking immigrants by examining (1) the standing of indigenous languages in the U.S. immigration system, (2) venues of language discrimination, (3) the application of law and policy related to access to interpretation for Limited English Proficient (LEP) indigenous language speaking immigrants, (4) language ideology in the courtroom, and (5) indigenous language data findings. The conclusion discusses the future of indigenous language rights in the U.S. immigration system.

There are several avenues to understanding applied language rights in the U.S. judicial systems. The shorter route runs the gambit of U.S. federal language law and policy guidance in a myriad of immigration

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the signing of the Gadsden Purchase. Family ties and previous censuses in Mexico have shown that O'odham families are present in communities that continue to exist despite the international border. Until 2018, three informal crossing places (San Miguel Gate, Papago Farms, Menager's Dam) were accommodated by the Border Patrol for O'odham. Tribe members use only their tribal identifications to enter their reservation, where many members legally receive services and vote in tribal elections.

<sup>3</sup> Interview with Estevan, deported O'odham tribal member, in Nogales, Sonora at the TAP Bus terminal (April 2, 2018).

<sup>4</sup> There are some exceptions; a notable one is Guarani, spoken in Paraguay as a national language in a low language setting of diglossia. Others are Aymara and Quechua in Bolivia, comprising some 42 percent of speakers after Spanish's 75 percent.

settings. The long road is perhaps more difficult to discern, but rooted in settler colonialism in the Americas, and beyond. Both routes have roots in historical (read colonial) processes and the particular Anglophone cultural legacy that is U.S. modernism, jurisprudence, and language ideology.

### I. STANDING OF INDIGENOUS LANGUAGES IN THE U.S. IMMIGRATION SYSTEM

In the U.S. immigration system, most speakers of indigenous languages are mostly—but not exclusively—indigenous peoples from Mexico and Guatemala. Prior to European contact, some 600 unique indigenous societies existed in North America. Their languages are part of twelve language families which, in contrast to Europe's one Indo-European language family, demonstrates greater language diversity. Hidden deep within the landscape of languages in the United States are the histories of forced internal migrations of Native Americans under modernism, as well as regional migrations which predate the colonialization of the United States. Native American languages therefore contain stories of past multilingual encounters with official and unofficial language policy. Their stories are as of yet largely untold and left unacknowledged. They however offer clues as to the current disparate implementation of Limited English Proficiency policy for indigenous language speaking immigrants. They are part of the long road to understanding the virtual exclusion of indigenous languages in most communications between indigenous language speakers and U.S. immigration officials.

By the first decade of the twenty-first century, 12.8 percent of Native Americans (American Indian and Alaska Native) in the United States spoke their native languages.<sup>5</sup> Other indigenous languages from abroad have entered the realm of indigenous language speaking communities in the United States. Indigenous language vitality remained evident in five states which in 2009 counted native languages in the top five language(s) spoken: *Yupik* was third in Alaska; *Dené* (Navajo) was third in Arizona; *Tagalog and Ilocano* (from Philippines) were second and third in Hawaii; *Crow* was fourth in Montana, and *Dakota* registered third in

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<sup>5</sup> For figures on which this calculation is based, see U.S. Census Bureau, *The American Indian and Alaska Native Population: 2010* Table 1 (Jan. 2012) <https://www.census.gov/history/pdf/c2010br-10.pdf>; U.S. Census Bureau, *Native North American Languages Spoken at Home in the United States and Puerto Rico: 2006–2010* Table 1 (Dec. 2011), <https://www2.census.gov/library/publications/2011/acs/acsbr10-10.pdf>.

South Dakota.<sup>6</sup> Two additional states counted indigenous languages in the top ten: *Cherokee* registered sixth in Oklahoma and *Dakota* was ninth in North Dakota.<sup>7</sup> U.S. census forms, however, do not have discrete categories for Mayan languages, though starting in 2010 languages were allowed to be written in. Highly inconsistent efforts by federal education programs to support native language pedagogy obscure the spoken use of indigenous languages generally, and immigrant indigenous languages particularly.

Indigenous peoples arrive from South America to the United States in much smaller numbers, as do others from Africa and Asia. Indigenous language speakers may be of rural or urban origins. For a significant proportion, an indigenous language is the language of their parent's household and their primary language. From Guatemala alone there are 22 Mayan indigenous languages, three from Honduras, and in Mexico there are 62 indigenous languages and 362 legally distinct language variants allowed in Mexican court settings.<sup>8</sup>

The 2010 U.S. Census was the first U.S. census to include indigenous languages of indigenous immigrants. A paltry 7650 speakers of Mayan languages were counted.<sup>9</sup> The Oto-Manguen language family centered in Mexico (including Mixtec and Zapotec languages) numbered 5100, while Arawak speakers in Northeastern South America registered 3150 speakers.<sup>10</sup> Other South American indigenous languages registered only 2850 speakers.<sup>11</sup> These figures represent vast undercounts when other documented sources are considered, but nevertheless, the comparison draws sociolinguistic distinctions that the U.S. immigration system faces.

Immigrants however bring their own indigenous mother tongues into the same landscape of languages. For example, three Mayan

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<sup>6</sup> U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for States 2009-2013* Tables 2, 3, 12, 27, 35, 37, 42 (Oct. 2015), <http://www2.census.gov/library/data/tables/2008/demo/language-use/2009-2013-acs-lang-tables-state.xls?#>.

<sup>7</sup> *Id.*

<sup>8</sup> *Mayan Languages Spoken in Guatemala*, BARBIER INTERNATIONAL (2019), <https://barbi-erintl.com/mayan-languages-spoken-in-guatemala>; Mary Quill, *What is the Official Language of Mexico? Hint: It's Not Spanish*, LATIN POST (March 21, 2020).

<sup>9</sup> U.S. Census Bureau, *Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over for United States: 2009–2013* (October 2015), <https://www.census.gov/data/tables/2013/demo/2009-2013-lang-tables.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

languages were among the top 25 languages spoken in initial case completions in federal immigration court in 2016, continuing an upward trend of increasing numbers of indigenous language speakers since at least 2012.<sup>12</sup> A previous estimate of indigenous language speakers from Guatemala alone was based on Arizona border proxy data for deportations and detained children—by this author. That estimated number of adult Guatemalan Mayan language speakers in 2013–2014 was 21,457.<sup>13</sup> An additional 7727 indigenous language speaking Guatemalan children were estimated for a total of 29,184 Guatemalan Mayan indigenous language speakers in the U.S. immigration system.<sup>14</sup> Nevertheless, most immigration attorneys often only see such speakers one client at a time, unless they have witnessed streamline (criminal court) proceedings, or visited the family detention center in Karnes, Dilley, or Turnillo, Texas.

After an indigenous language speaker is cleared from short-term detention, they are transferred to Immigration and Customs Enforcement (ICE) custody, and then placed in longterm detention in either an ICE-administered or a privately contracted facility. At intake, indigenous languages are not assessed, nor are services offered by detention staff in indigenous languages. Language data is not collected. Detection then of an indigenous language speaker is entirely dependent on an individual staff person's discretion, with no incentive to intervene, and numerous incentives to not intervene. Even when critical functions are to be performed, such as medical services, no language screening mechanism, either for Spanish or indigenous languages, is used. A similar process occurs as immigrants report to immigration court for hearings. While there are standards for interpreters in court, there is no indigenous language screening mechanism by government attorneys, by attorneys defending their clients, nor the court itself to assess language need. It is up to the judge or magistrate to discern if interpretation is required.

Prior to arriving at immigration court, other venues in the system—family detention centers, the proliferation of privately-run children's shelters administered by the Office of Refugee Resettlement, and other federally contacted legal service providers—are also required to provide

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<sup>12</sup> U.S. Department of Justice, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2016 STATISTICAL REPORT E2 (2017), <https://www.justice.gov/eoir/page/file/fysb16/download>.

<sup>13</sup> BLAKE GENTRY, EXCLUSION OF INDIGENOUS LANGUAGE SPEAKING IMMIGRANTS IN THE U.S. IMMIGRATION SYSTEM, A TECHNICAL REVIEW 46 (2015).

<sup>14</sup> *Id.*

first language assistance, and they do not. Nor do they publicly report their language populations. On 27 June, 2018, the Commissioner for Customs and Border Protection (CBP) in Tucson reported publicly only anecdotal efforts to identify Mayan language interpreters, not citing any protocol or due process protocols required of ICE or CBP.<sup>15</sup>

This gap between immigration law and applied policy is the crux of this Article. Interpretation and translation are the end products of applied language policy. If indigenous languages are ignored, then the rights of indigenous language speakers go unattended. Further, as LEP indigenous language speaking immigrants proceed further into the system, the greater number of language contacts they make, and the greater is their accumulative experience of language discrimination.

If larger patterns of discernable language discrimination are to be addressed with remedies, it is crucial to identify *policy to practice gaps* across all venues in the U.S. immigration system. The main venues of the U.S. immigration system are discussed in the Part II.

## II. VENUES OF LANGUAGE DISCRIMINATION

The U.S. immigration system is defined here as comprised of sub-agencies of the Department of Homeland Security (DHS), the Department of Justice (DOJ), and Department of Health and Human Services (DHHS). Agency personnel, upon encountering indigenous language speakers, are primarily concerned with a series of disjointed interpretations and translations of law into Spanish, and subsequently into indigenous languages. Indigenous language speakers are not collectively considered part of an ethnicity and race apart from other immigrants, and therefore their collective language need in the U.S. immigration system is left unaddressed—except for individual interpretation when requested by legal professionals.

The grey literature is full of accounts of the detrimental results of such encounters in all such venues. What is rarely considered however is the point of view of native language speakers. Federal language policy posits a speaker's status as a matter of being a Limited English Proficient (LEP) speaker. Language exclusion contacts for an LEP indigenous language speaker, from arrest to case resolution, ranges from a minimum of six exclusive processes for families released by ICE in U.S. southern

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<sup>15</sup> Kevin K. McAleenan, CBP Commissioner, Remarks at a Meeting at the Tucson Sector Border Patrol Headquarters (June 27, 2018).



border towns, and for adults sent to longterm detention or federal prison on criminal charges, a maximum of 13 language exclusion processes with many more iterations within processes depending on frequency of contacts and length of detention.<sup>16</sup> The origin of language discrimination occurs at first contact, both currently and historically. Indigenous people, however, experience its replication on a daily basis throughout the U.S. immigration system in acts of commission and omission.

### **A. *First Contact, Origin of Language Discrimination***

Indigenous language speakers are spoken to in a language other than their primary language—Spanish—by CBP every day in scores of Border Protection processing centers all along the U.S. southern border. Like the experience of the O’odham speaker first introduced in this article, the most damaging aspect of discriminatory practices experienced by adult indigenous language speaking immigrants begins at arrest.

Of particular concern, and left un-examined to date, is the use of statements obtained by the Customs Border Protection screening for “credible fear” during CBP custody, or by Border Patrol between ports of entry at land borders, and then later introduced into court as evidence in asylum hearings. These statements are documented in the Narrative Outline on form I-213, under “elements which establish administrative or criminal violations,” prior to an Asylum Officer conducting a Credible Fear Interview.<sup>17</sup> Currently, indigenous language immigrants are routinely asked in Spanish four open ended questions: 1) *Why did you leave your home country or country of last residence?* 2) *Do you have any fear or concern about being returned to your home country or being removed from the United States?* 3) *Would you be harmed if you were returned to your home country or country of last residence?* 4) *Do you have any questions or is there anything else you would like to add?*<sup>18</sup>

In CBP processing centers, evidence points to immigrants awoken in the very early hours of the morning, designed to deliberately disturb their circadian rhythm; a practice of torture used in interrogations of

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<sup>16</sup> See GENTRY, *supra* note 13, at 38.

<sup>17</sup> See, for example, the redacted court record of an I-213 for a female Salvadoran apprehended near Hidalgo, Texas and held at Karnes County Detention Center in Texas as of July 30, 2014: <http://www.virginiaraymond.com/wp-content/uploads/2015/10/I-213-Record-of-Portable-Inadmissible-Alien.pdf>.

<sup>18</sup> *Credible Fear FAQ*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/faq-page/credible-fear-faq#t12831n40132> (last visited Feb. 3, 2020).

terrorists.<sup>19</sup> For cognitive analysis, such interrogation techniques necessarily prove counterproductive for accurately documenting an immigrant's credible fear, or lack thereof. The technique, akin to interrogation methods of the Department of Defense, is designed not to elicit credible fear but to detect criminal information from unadorned responses. Their responses taken under such circumstance are nevertheless then entered into immigration hearings months or years later as evidence; evidence often used to make a counterclaim of a baseless asylum application.

First contact can establish three errors with serious consequences for an indigenous language speaking immigrant's case in subsequent venues. The first error may be in discerning an immigrant's credible fear of return. The Spanish speaking capacity of an indigenous person, or the proficiency of a Border Patrol agent's capacity to speak in Spanish with indigenous persons is never questioned. For Border Patrol, this is a task requiring minimal effort. Given Customs Border Patrol agents are trained to seek information on criminal networks, tactics for interrogation are not based on needing an LEP assessment, but rather on an immigrant's involvement in criminal enterprises, i.e. smuggling of other immigrants or narcotics. Credible fear is a simple check-off box on form I-213, with any detail recorded on a second page—form I-831. It is at first contact where seeds of discrimination are planted for their asylum hearing years later.<sup>20</sup>

One former Border Patrol agent, Francisco Cantu, remarked in a personal interview that “*No one would ever call an interpretation line,*” but Border Patrol agents would certainly lean on immigrants to speak Spanish.<sup>21</sup>

In “the field,” from ports of entry or other processing centers, CBP-derived Credible Fear Interviews raise serious questions of credibility given that answers to agents' questions in the field may be given under duress when immigrants are faced with armed and uniformed

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<sup>19</sup> BLAKE GENTRY, DEPRIVATION, NOT DETERRENCE (2014), <http://www.guamap.net/uploads/4a9c982ea3914.pdf>.

<sup>20</sup> Border Patrol continued this practice at CBP (Southern Arizona) Headquarters, located on a U.S. military base—hardly a neutral context for ascertaining an immigrant's reason for entry without inspection. Immigration courts serving detained immigrants in Florence and Eloy, Arizona accepted such reports as evidence in initial hearings. This practice is on-going. Interviews with a consulate worker, language service provider, and immigrant (April–May 2018).

<sup>21</sup> Interview with Francisco Cantu, former Border Patrol Agent, in Tuscon, Ariz. (May 11, 2018).

paramilitary force. Immigrants who are fearful of threats to their lives by armed officers in their own countries may not, logically, be willing to state openly to another armed officer why they fled. Indeed, if they do fear threats made to them by local security forces, the officers' uniforms, arms, and demeanor are more likely to produce false responses given the penchant of immigrants for protecting their families and acting to save their own lives.

The second error, due to indigenous language exclusion, may occur in establishing an immigrant's criminality or innocence. The third error is the failure to record immigrants' primary language. All three errors are contingent upon indigenous language speakers not being allowed to speak their primary language.

### **B. *Streamline Criminal Court***

Border Patrol agents explain that interviews are often for the purpose of establishing criminality, and indeed, the pro forma indigenous language exclusion they practice against Limited Spanish Proficient (LSP) populations is transmitted to criminal court via the Narrative Outline in the I-213 described above.

This process, beginning with the arrest and then screening of immigrants at border processing centers in the first twenty-four hours under short-term detention, may continue in criminal proceedings given the recorded result is contained in the record. Prior to criminal court and during immigration proceedings, admissions of guilt elicited in Spanish by appointed attorneys and put on record by prosecutors are often obtained using Spanish, a defendant's second language, instead of the detainee's primary language. Once these indigenous language speakers serve time for criminal charges, the same *second language testimony* can progress into immigration hearings.<sup>22</sup>

Given that the executive branch's interpretation of "immigrant criminality" includes misdemeanors under the 287 G-Program, in Streamline Criminal Court in Tucson, Arizona many immigrants are categorically labeled as criminals. For those indigenous language speaking immigrants who reported a prior illegal entry, the common practice of the government was to dismiss their cases. But that practice ended

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<sup>22</sup> Border Patrol continued this practice at CBP (Southern Arizona) Headquarters. Immigration courts serving detained immigrants in Florence and Eloy, Arizona accepted such reports as evidence in initial hearings. This practice is on-going. Interviews with a consulate worker, language service provider, and immigrant (April–May 2018).

by Spring of 2018 under the Trump Administration. Judges in criminal court are nevertheless administratively incentivized to not delay mass hearings. When prosecutors dismissed such cases given the questionable admissibility of *second language testimony*, immigrants were nevertheless remanded to immigration court where they languished in longterm detention to await their immigration cases—most often without being identified as indigenous language speakers needing interpretation for legal counsel.

The change means that while indigenous language speakers are physically shackled in chains with Spanish speaking immigrants, they are commonly tried without language screening, tracking, or language provision by the U.S. criminal courts unless their attorney requests, or the judge orders, interpretation.<sup>23</sup> The effect of Streamline Criminal Court is often the concealment of primary languages of many (but not all) indigenous language speakers who are further drawn into the U.S. immigration system.

### C. *Longterm Detention*

In longterm detention, when an immigrant enters the facility, there is no language assessment or assignation carried out by intake staff. No ICE office—who transferred the detainee from CBP/BP custody to the facility—will have identified their primary language as required by Executive Order 13166.

If an immigrant has a medical condition, medical staff in detention will have no documentation of their language. Staff will attempt to determine a language only if they cannot ascertain the minimal screening conditions of a patient. Then they might attempt to contact a commercial language line and guess at the language spoken.

The practice of relying on other detainees to interpret or identify indigenous language speakers is rife with personal risk for the indigenous language speaker; they may be in a coercive relationship with the other “speaker” or they may not want to divulge sensitive information to another detainee which may expose them or their family to further risk. Dialect differences can also misinform well intentioned efforts; dialect differences are discernable by professional interpreters but not by linguistically untrained detention staff.

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<sup>23</sup> Author’s personal observation in Streamline Criminal Court in 2017, and verified by foreign consulate personnel who attend Streamline Court sessions.

Migrants' first contact with the legal process in detention is with ICE detention officers who are not required to follow any standardized nor tested indigenous language protocols. Nor do these officers receive training in indigenous language screening, tracking, or reporting. There is no established screening process by linguistically-informed officers in public or privately-contracted U.S. immigrant detention centers. There is language provision available through telephonic or in-person interpretation if ICE officers request it, but they are under no obligation to use it. If they conduct standard interviews with detained immigrants in Spanish instead of a person's indigenous language, no one would ever know that a detained indigenous person whose primary language is an indigenous language did not comprehend the questions asked. There is reason for great alarm at this arrangement.

ICE reported in 2015 that among the 24 frequently encountered languages was the Maya language of K'iche (Quiche), but it did not list Mam nor Kanjobal as present.<sup>24</sup> That data directly contradicts EOIR's 2015 and 2014 list of *Top 25 Languages in Initial Case Completions* which lists both Mam and Quiche.<sup>25</sup> Mam is listed as more frequent in Immigration Court than Quiche (K'iche). This discrepancy is likely explained by ICE's inability to assess languages (other than Spanish) for indigenous language speakers from Mexico and Guatemala, rather than as an anomaly where immigrants at first contact with ICE are later absent in initial hearings in immigration court. It would be illogical to conclude that one language group had exceedingly higher rates of release through bail postings than another language group given similar socioeconomic and geographical backgrounds. The data anomaly demonstrates what happens when agencies are allowed, even encouraged, to use their own internal processes which favor the practices of ICE officers on an individual basis, i.e. based on their professional discretion.

In detention, immigrants who are able to articulate their desire to seek asylum face a credible fear interview by USCIS Asylum officers. Asylum officers do have language interpreters available to them and they are trained to detect communication barriers. However, there is no public record of the United States Citizenship and Immigration Services'

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<sup>24</sup> For ICE language list see U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, LANGUAGE ACCESS PLAN 19 (2015).

<sup>25</sup> U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2014 Statistical Report E2 (2015).

(USCIS) use of interpretation by language nor by the number of cases in detention settings. Immigrants' responses, initially taken by armed border guards, are then reported and USCIS Asylum Officers may or may not subsequently interview them in an official Credible Fear Interview.

The flow of "evidence" documented on form I-213 is forwarded from CBP/BP to ICE, and then from ICE to Asylum Officers, but the identity and primary language of an indigenous person and the indigenous language she or he speaks are not.

#### **D. *Immigration Court***

For many immigrants in detention centers, the lack of access to legal representatives often means that they attend a minimum of three asylum hearings in courts which are physically located on the grounds of locked detention centers. Most often, they attend such hearings without legal representation. Further, interpretation is not provided prior to hearings (where the immigrant is advised of the right to obtain an attorney), nor during hearings.

"Evidence of illegal entry" is presented by government attorneys from the record provided by CBP assessing an immigrant's credible fear. This information is used predominantly to argue against claims for political asylum or other forms of relief from deportation. Indigenous language data from final asylum hearings is reported only qualitatively by EOIR in their annual report in the top 25 language league table, but they withhold the number of speakers of each language, making national data analysis on numbers of indigenous language speakers inaccessible. More specifically, this reporting obscures the numbers of indigenous language speakers in specific areas—areas that would require a language assessment of the whole population in order to provide language resources on a regular basis as called for in Executive Order 13166. It also does not allow for analysis of discriminatory patterns of language discrimination in particular facilities and courts where indigenous language speakers frequently appear.

In immigration court, inadequate interpretation service is evident from the many complaints lodged publicly about partial, inconsistent, and incorrect interpretation. According to the Consortium for Language Access in the Courts, externally validated testing requirements for interpreter certification which meet national standards of the Administrative Office of the U.S. Courts, or that follow the standards used by state courts

(which are subject Title VI antidiscrimination provisions), are lacking.<sup>26</sup> The privately contracted assessment from Lionbridge, Inc. used exclusively by EOIR is considered invalid by New Jersey and Hawaii State courts. Because it has not been tested in relation to the other standards, it remains invalid and is therefore judicially subjective. After an ALIA and EOIR meeting in 2010, The Office of Chief Immigration Judge “discovered that formal certification would be cost-prohibitive.”<sup>27</sup>

### **E. *Family and Child Detention***

Families in detention centers do not have consistent access to indigenous language interpretation, and facility personnel are not trained nor do they have enforceable language protocols that provide for consistent interpretation in indigenous languages. Detained minors also have limited access to language interpretation from case manager supervisors or program directors. Services such as bilingual educational classes are conducted in Spanish, and indigenous children are often isolated socially; a dangerous practice for young vulnerable children in privately-administered locked facilities. There is no public reporting on the number of indigenous language speaking children that enter or exit their facilities.

Part III examines what these venues of immigration have to do with policy-to-practice gaps in language interpretation in immigration law and policy. Particular to these settings however are the predominance of indigenous women and children. Where asylum interviews are conducted with women subjected to violent acts, separation anxiety for children can arise when mothers are separated from children for these interviews, and when not, children may be subject to hearing testimony of the victimhood of their mothers. Without child care provision in a child’s indigenous language during interrogations, such in situ language policies are to date wholly inadequate to handle this situation.

This omission underlines possible further damage to child development and retraumatization of parents who were unable to protect other family members during acts of violence.<sup>28</sup> The wholesale inadequacy of

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<sup>26</sup> NATIONAL CENTER FOR STATE COURTS, A NATIONAL CALL TO ACTION (2013), <https://www.ncsc.org/services-and-experts/areas-of-expertise/language-access/~media/files/pdf/services%20and%20experts/areas%20of%20expertise/language%20access/call-to-action.ashx>.

<sup>27</sup> For quality of interpretation, see Laura Abel, *Language Access in Immigration Courts*, BRENNAN CTR. FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW 6–7 (2011). For certification testing validity, see *id.* at 6 n.48.

<sup>28</sup> See *CARA project files complaint about continued detention of traumatized families*, CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (Mar. 29, 2016).

this ad hoc approach where privacy is wanting is a direct effect of indigenous language exclusion. Children in shelters often fare much worse. A recent Office of Refugee Resettlement (ORR) report cited over 4,000 cases of possible child abuse within contracted immigrant children shelters administered by the Department of Health of Human Services and implemented by the Office of Refugee Resettlement.<sup>29</sup> The ORR report failed to distinguish or report on indigenous children's language status, and whether their particular vulnerability was safeguarded against possible disproportionately higher levels of abuse.

Disproportionate levels of abuse were also documented by the Florence Immigrant and Refugee Rights Project in 2009.<sup>30</sup> The Florence Project reported that 26 percent of children they interviewed were indigenous language speakers who did not understand their orders for deportation.<sup>31</sup>

### III. LAW AND POLICY FOR INDIGENOUS LANGUAGES OF IMMIGRANTS IN THE U.S. IMMIGRATION SYSTEM

#### A. Law

As early as the period of colonization of the U.S. West, the U.S. judicial system recognized the need for interpreters as established in "*Armory vs. Fellows*, in 1809; *In re Norberg* in 1808, [and] *Meyer vs Foster*, in 1862."<sup>32</sup> State level legislation on interpreters' status and compensation was subsequently enacted in Pennsylvania (1865) in New York (1869) and in California (1884). But general cultural disregard for minority language rights and English-only initiatives retarded broader applications of minority language rights for most of the twentieth century. Not until 1978 was national legislation enacted recognizing that the linguistic presence of other languages in federal court is part of the fundamental rights recognized under U.S. constitutional law.<sup>33</sup> The Court Interpreters Act of 1978 (Public Law 95-539) and the subsequent Court

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<sup>29</sup> See Caitlin Owens et al., *Thousands of Migrant Youth Allegedly Suffered Sexual Abuse in U.S. Custody*, AXIOS (Feb. 26, 2019), <https://www.axios.com/immigration-unaccompanied-minors-sexual-assault-3222e230-29e1-430f-a361-d959c88c5d8c.html>.

<sup>30</sup> ANA ARBOLEDA & DORIEN EDIGER-SETO, SEEKING PROTECTION, ENDURING PROSECUTION: THE TREATMENT AND ABUSE OF UNACCOMPANIED UNDOCUMENTED CHILDREN IN SHORT-TERM IMMIGRATION DETENTION 10 (2009), <http://www.firrp.org/media/BPAuseReport.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> ROSEANNE DUENAS GONZALEZ, FUNDAMENTALS OF COURT INTERPRETATION 4 (2012).

<sup>33</sup> *Id.*



Interpreters Amendments Act of 1988, established interpretation rights for defendants and witnesses in federal courts.<sup>34</sup> Immigration court, however, is an administrative court run by the Department of Justice and falls outside the scope of the act.

Prior to the Court Interpreters Act's passage, the Civil Rights Act of 1968's Title VI clause provided for language as part of nondiscriminatory principles for persons of different national origins, race, and religion. Title VI, however, applies to individual recipients and state agencies which receive federal aid and not to federal courts. Federal departments and agencies involved in the U.S. immigration system (ORR, CBP, ICE, USCIS) also do not fall under Title VI. Indigenous language speaking immigrants' main contact and experience in language discrimination is in the U.S. immigration system where Title VI (45 CFR Part 80) does not apply.

The intent of Executive Order 13166 issued in 2000 was to fill this gap for Limited English Proficient persons who experienced language discrimination with U.S. federal agencies where Title VI was inapplicable. Executive orders are constitutionally authorized under Article II, Section 1 of the Constitution; Section 3 of Article II instructs the President to "take Care that the Laws be faithfully executed." That instruction applies to each succeeding administration and all agencies under DHS.

The policy evolution of federal LEP language rights began in December of 2000 with Executive Order 13166. DHHS submitted a plan in accordance with the order to DOJ titled *Improving Access to Services for Persons With Limited English Proficient (LEP)*. The plan called for federally funded state programs to implement their own Limited English Proficient (LEP) programs, and for HHS to survey needs of its federal sub-agencies and then create a three-year programmatic phase-in for three vital language services:

1. Each HHS sub-agency was create a mechanism to assess "on a regular and consistent basis" the "language assistance needs of current and potential customers" and to create a mechanism to assess their "capacity to meet these needs . . . ."

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<sup>34</sup> Court Interpreters Act, 28 U.S.C. § 1827–1828 (1978).

2. Each HHS sub-agency was to provide “oral language assistance in response to the needs of LEP customers, in both face-to-face and telephone encounters.”
3. Each HHS sub-agency was to produce vital documents in languages other than English where a significant number or percentage of the customers served or eligible to be served has limited English proficiency.<sup>35</sup>

The programmatic reporting requirements of Executive Order 13166 specify the use of four steps: (1) number or proportion of LEP individuals, (2) frequency of contact with program, (3) nature and importance of the program, and (4) available resources.

#### A. Policy

Policies are operational orders, often released in the form of guidance, derived from law and issued to federal departments and agencies by the Executive. DOJ issued its LEP Guidance in 2002.<sup>36</sup> By 2003, 40 federal agencies issued LEP regulations compliant with Executive Order 13166. A *Tips from the Field* resource document was issued in 2004 by DOJ. The resource was designed to assist in assessing programmatic capacity for provision of English Limited Proficient services to aid 911 call centers, law enforcement agencies, domestic violence service providers, courts, and DOJ federally funded programs.<sup>37</sup>

Various deficiencies have since been reported: that the Government employs unqualified interpreters (American Immigration Lawyers Association (2010)), that interpretation was inadequate (National Language and Access Advocates Network), and that lengthy portions of hearings went uninterpreted (*El Rescate Legal Services vs. EOIR*), respectively.<sup>38</sup> The Department of Homeland Security and its sub-agencies, CBP and ICE, demonstrate a general failure to internalize DOJ Guidance on the assessment and provision of LEP language services for immigrants.<sup>39</sup>

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<sup>35</sup> Language Access Plan, Department of Human Health and Services (2013).

<sup>36</sup> See U.S. Dep't of Justice, *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons*, 67 FED REG. 41455, 41455 (2002).

<sup>37</sup> See GENTRY, *supra* note 13, at 15.

<sup>38</sup> See GONZALEZ, *supra* note 32, at 296–297.

<sup>39</sup> U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *DHS NEEDS TO COMPREHENSIVELY ASSESS ITS FOREIGN LANGUAGE NEEDS AND CAPABILITIES AND IDENTIFY SHORTFALLS* 32, 40, 41 (2010), <http://www.gao.gov/assets/310/305850.pdf>; GENTRY, *supra* note 13, at 14–15.

On February 17, 2011, a new memorandum restating the federal government's obligation and requiring federal agencies to comply with Executive Order 13166 was issued by Attorney General Eric Holder.<sup>40</sup> The DOJ again then noted significant variations in compliance with principles of language access, and a directive was issued for department heads to establish Language Access Working Groups.

Beck's critique of applied law has found that the basic statutory requirements under the LEP Executive Order 13166 remain as of 2018 unfulfilled, and that the order, as originally conceived, is therefore not implemented and is wholly unenforced.<sup>41</sup> Beck also critically stated that DHS has failed to instruct its primary immigration agencies (CBP and ICE) to inventory the languages most frequently spoken, and to track the languages of immigrants they process.<sup>42</sup> The same requirements apply to the Department of Homeland Security as a federal agency obligated under Executive Order 13166.

### **B. Impact of DHS' Noncompliant Language Policy**

The longterm impact of not implementing language policy duly authorized by law is clear. For example, from 2000–2010, interpreted court events increase by 87.86 percent.<sup>43</sup> In 2010, 98 percent of all interpreted events were interpreted in Spanish.<sup>44</sup> The absence of a language assessment tool to detect indigenous language speaking immigrants among those Spanish speakers enables the misidentification of indigenous language speakers as people from countries who speak Spanish.<sup>45</sup>

There is no current systematic language study carried out within the three federal departments (DHS, HHS, and DOJ) and their agencies to determine, with scalable metrics, the extent of language exclusion of indigenous languages, let alone a time series comparison to examine trends. Without publicly accessible language data, unverified claims of compliance by any federal agency lack validity and they misrepresent requirements mandated under Executive Order 13166. The lack of

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<sup>40</sup> Katherine L. Beck, *Interpreting Injustice: The Failure to Comply with Federal Language Access Requirements in Immigration Detention*, 20 HARV. LATINX L. REV. 15, 27 (2017).

<sup>41</sup> See *id.* generally.

<sup>42</sup> *Id.* at 36.

<sup>43</sup> GONZALEZ, *supra* note 32, at 35.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

national language data and published language analysis may obscure, but it cannot hide, widespread and ongoing discrimination.<sup>46</sup>

Part IV provides indigenous language data for the Southern Arizona (Tucson) Sector of Border Patrol as an example of the type of data-gathering needed to establish such quantified indigenous language data nationally.

When seen as a whole, despite episodic guidance to improve language interpretation in legal settings, the series of federal law and policies related to LEP indigenous language portray a weak silo approach by federal agencies without credible mandates for implementation, monitoring, investigation, nor penalties for noncomplying federal agencies. A consistent reality of avoidance pervades these efforts; efforts that which remain largely on paper.

There is no demonstrated will to instill a frontline response regarding indigenous language rights. DHS inspectors, ICE Directors, CBP Commissioners, and CBP Sector Chiefs all come and go; but what remains is a pattern of linguistic exclusion.

That this highly tolerated discriminatory legal precedent remains sixteen years after 2002 may signal that other tools of analysis may shed more light on the nature of language discrimination than recitations of systemwide gaps in practice protocols and policy. This is an arena of investigation where the professional studies of sociolinguistics and law part ways. Sociolinguistics concerns itself with the study of how language is used, by whom, and within and across social groups. Its tools of analyses lie outside of legal frameworks. Such tools are applied in the Part IV for consideration of language ideology in the courtroom.

#### **IV. LANGUAGE IDEOLOGY IN THE COURTROOM**

If they have no expertise in sociolinguistics, then officers of the court (judges and attorneys) are no more or less qualified to apply equitable language policies than defendants or asylum seekers themselves. They are, however, in relative positions of power, and their decisions, if based on faulty interpretation or no interpretation, are subject to claims of discrimination on appeal, especially when shallow and highly inconsistent standards for interpretation are facilitated for expediency's sake. Without utilizing a mandatory and validated language assessment

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<sup>46</sup> Beck, *supra* note 40, at 17–19.

protocol for immigration court, language discrimination against indigenous languages pervades immigration proceedings.

A common intellectual error committed by personnel in the U.S. immigration system is that they assume they can tell when a person needs or does not need interpretation. They make that assumption based on their own command of language(s), generally English and sometimes Spanish. Those languages dominate the very social and cultural exchanges between other immigrants they encounter and personnel, like themselves, who make up the system. Their mistake is made by projecting their own ideals about language transmission onto languages that they do not speak.

An analogy to immigration court officers' customary approach to *assessment-free* language interpretation would be helpful here. Suppose there is an English-only speaking patient from Greece in a hospital with a pending emergency surgery. The hospital employs just two surgeons: both speak only Greek. If the patient had lived in Greece, then hospital staff, similar to immigration court personnel, would assume that the patient spoke Greek even if the patient exclusively spoke English. Given their professional conduct in immigration court, court officers should be comfortable with allowing a monolingual Greek-speaking surgeon to interview the patient in Greek prior to his surgery, despite the patient being a monolingual English speaker.

The patient would not receive information *in the patient's language* regarding the need for surgery, preparation for surgery, nor necessary steps to take in aftercare. *The patient did not have enough knowledge of Greek to respond intelligently to the questions relating to the emergency medical condition*, but had just enough knowledge to answer "yes" or "no" and to sign a document the patient could not read and which was not interpreted. The patient would be put at great medical risks if this practice was followed.

Thankfully, medical professionals do not operate as the ridiculous scenario describes. Of course one might presume this analogy sounds all wrong because it seems indigenous-language speakers do not enter immediately into such dire decision making scenarios; but they do, at first contact. Then, more than 600 days can pass while waiting for their asylum hearing, and little is done to detect their language through various immigration venues over that long period.

### **A. *Genesis of Language***

Americans live in one of the most dynamic countries in the world: in coastal and highly urbanized areas, where cosmopolitan social environments provide considerable exposure to modern systems of communication using ever more technologically advanced devices. In the era of mass communications, the frequency of language transmission is technologically driven. Human and machine translation appear to be improving remarkably by the use of Google Translate™, WordReference.com™, Linguee.com™, and many other specialty interactive translation tools and websites. Translation, whether by computers that structure algorithms or by humans, still remains as the more static written expression of oral languages.

The diversity of oral language expression, in contrast, is in competition with the more voluminous language transmission as a determinant of meaning because it is the preponderance of speech communities, rather than machines, which collectively accept or reject new meanings and words into a language. It is, in short, the speakers of languages and the confluence of various subspeech communities that comprise the language group that determines the more nuanced and deeper distinctions in language usage. Written texts can influence and maintain grammar, phonetic structure, and syntax, but the diversity of oral expression provides the socially and culturally contextualized meaning of communication.

Significant language dialects comprise some Mayan indigenous languages where such transformative influences are less prominent. Without the social context and the cultural clues provided by language speakers of the same dialect of a language, misinterpretation, like mistranslation, is a common occurrence. Misinterpretation has immediate consequences whereas mistranslation may generally produce delayed consequences, the severity depending on the value of the document translated.

### **B. *Case Examples***

#### *1. DISCRETE DIALECTS*

The concept of socially and culturally informed interpretation became, for example, readily apparent to an attorney who represented a Palestinian asylum seeker from Gaza. An Iraqi Arabic dialect speaker was appointed to his client in federal immigration court. At an asylum hearing on the merits, a frustrated immigration judge became exceedingly irate after his instructions to the interpreter to ‘interpret word for

word' his questions to the asylum applicant, did not produce the full responses to the highly structured questions he asked. The asylum applicant from Gaza then became increasingly withdrawn, and the interpreter acted intimidated. The judge actually yelled at both the defendant and the interpreter during the hearing. The interpreter was berated by the judge for asking the judge for a clarification, being told that only the judge "can ask questions."

In a second hearing, a different interpreter was court appointed, an Arabic speaker with a Syrian dialect, and the defendant was more easily able to understand her Arabic. He trusted the social and cultural sense imparted by the second interpreter, and was able to respond more readily to the same judge.<sup>47</sup> The court atmosphere was much less antagonistic, more factually informed, and a deeper line of questioning from the same judge was successfully pursued. This is a contrast between a dysfunctional versus a linguistically, socially and culturally informed interpretation.

Before the defendant's forced migration, he was a law student who learned very limited English in a refugee camp in Greece and in five other intermediate countries of exile. What might have happened if the asylum speaker had responded in court in English as an LEP? That later scenario is quite similar, in sociolinguistic terms, to the experiences of indigenous-language speaking immigrants when addressed only in Spanish.

## 2. *GENDERED LANGUAGE ERASURE*

A seventeen-year-old female Popti language speaker from western Guatemala made her first court appearance before an immigration judge. She was seven months pregnant and had a long history of sexual abuse. She also had no understanding of Spanish, no interpreter, and no attorney. According to her testimony, the immigration judge and Office of the Chief Counsel instructed her in Spanish to "sign here," on a

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<sup>47</sup> The court scene described in this Article was witnessed by an author who attended both asylum hearings of an asylum seeker from Gaza, Palestine, on November 2, 2016 and July 12, 2017, in Federal Immigration Court in Tucson, Arizona. The author requested his name not be published. The misinterpretation was also witnessed by a third Arabic speaker in the audience who explained to this author the difference of dialect. This author spoke with the asylum seeker about both interpreters, and the asylum speaker expressed a significantly higher comprehension level with the Syrian Arabic dialect speaker compared to the Iraqi Arabic dialect speaker. A second attorney, unrelated to this case, communicated that he had also witnessed a similar mismatch in Iraqi Arabic dialect for an Arabic-speaking client of his.

voluntary departure order; neither of them explained the consequences of her signing.<sup>48</sup>

That signature allowed her another 120 days stay, but when that deadline passed and she remained on U.S. soil, her voluntary departure became a removal order. In July 2017, ICE officers then forcibly entered her home by picking the lock on her front door without officially announcing themselves or bothering with a warrant.<sup>49</sup> In this case, both immigration court and enforcement officers completely disregarded Executive Order 13166.

### 3. TAKEAWAYS FROM CASE EXAMPLES

In court proceedings, other factors also come into play in the mix of interpretation which ideally facilitates a “level playing field” in communication. However, it is policy-based standards for interpretation that should determine how judges, attorneys, bailiffs, and court recorders assess the interpretation needs of asylum seekers, and not the subjectivity of court and enforcement officers. Without professionally maintained interpretation standards, court personnel are not qualified to know to what degree the interpretation provided accurate communication. Standards should facilitate a just hearing or trial; the absence of standards introduces communication error of more and less degrees.

As illustrated in the case of the Palestinian from Gaza, there is no standard for dialect matching, and only by happenstance was it corrected. For indigenous languages speakers in those settings, *unless an interpretation explains that a legal process exists, and that within that process their language rights are guaranteed, “jurisprudence” is literally, meaningless.* In the case of the Popti minor, due process appears to have been linguistically determined.

## V. SELECT INDIGENOUS LANGUAGE DATA FINDINGS

### A. *Missing in Action: Language Data*

Basic public information on the numbers of indigenous language speakers in final asylum cases reported by the Executive Office of Immigration Review (EOIR), the administrative body of the U.S. Immigration Court, is not available. While EOIR lists the top 25 most frequent foreign

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<sup>48</sup> Mark Reagan, *Woman Seeks to Stay in US; Feds set to Deport Victim of Sex Assaults*, BROWNSVILLE HERALD (Oct. 19, 2018), [https://www.brownsvilleherald.com/news/local/woman-seeks-to-stay-in-us-feds-set-to-deport/article\\_d11ce966-d3ef-11e8-925d-f37411a6b510.html](https://www.brownsvilleherald.com/news/local/woman-seeks-to-stay-in-us-feds-set-to-deport/article_d11ce966-d3ef-11e8-925d-f37411a6b510.html).

<sup>49</sup> *Id.*



languages spoken, the numbers of speakers are suppressed, even though the league table cannot be constructed without such data.

Though that data reporting gap may appear a short-term anomaly, it avoids institutional scrutiny of quantitative data comparisons for analysis of the very large longterm gap between the number of unscreened indigenous language speakers versus immigrants actually afforded interpretation. Standards for language assessment and screening with data collection protocols are needed at the outset.

Despite recent policy announcements, the Department of Homeland Security agencies still lack system processes for language assessment, identification, and interpretation. In short, for thousands of indigenous-language speakers, those agencies do not communicate with them in their first language, but rather, the agencies discriminate against them in their second language, Spanish. This systemic failure marks the end process of the “short road” of language exclusion.

Data shared below is for indigenous language speaking immigrant adults released by ICE to shelters in Tucson Sector CBP from mid-July 2014 to May 2017. Shelters operated as private charities run by Catholic Community Services of the Tucson Catholic Archdiocese and a Methodist Church, both of which are not contracted with the U.S. government.

Figure 1 below demonstrates a diversity of indigenous language speaking immigrants in the Tucson CBP Sector released to nonprofit immigrant shelters from mid-July 2014 through May 2017.<sup>50</sup> The general sheltered immigrant population and indigenous language speaking immigrants are compared in Figure 2.<sup>51</sup> Some features of that language population follow:

- Indigenous language speakers represented one in five or 20 percent of the adult immigrant population.

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<sup>50</sup> Data analysis in this Part is from the Indigenous Languages Office, Alitas Shelter in Tucson, Arizona. The data was gathered from Alitas Program, Catholic Community Services, Tucson Catholic Archdiocese, and the Inn Project, First United Methodist Church, both in Tucson, Arizona. Note: Percentages may not total 100 percent due to rounding up for values *greater than or equal to* .05 and down for values *less than or equal to* .04. Nine adult indigenous language speakers had “yes” recorded for their indigenous language. Using Guatemalan departmental data, the local indigenous language was imputed for the nine speakers when *greater than or equal to* 80 percent of the local population were indigenous with an identified indigenous language. One speaker was bilingual in Mam & K’iche and therefore counted twice; once for each indigenous language spoken.

<sup>51</sup> *Id.*

- 96 percent of indigenous language speakers were from the single country of Guatemala.
- More than 8 of 10 or 87 percent of indigenous languages speakers were female.
- 85 percent of all sheltered indigenous languages speakers spoke five Mayan languages: Mam, Q’anjob’al, K’iche, Chuj, and Popti from the Western or Central Highlands of Guatemala.
- 18 indigenous languages were present.
- 8 percent of indigenous language speakers were represented by Akateko, Q’eqchi, and Kaqchiquel speakers.<sup>52</sup>

**FIGURE 1: Language–Speaking Immigrants Sheltered in Tucson CBP Sector, Mid-July 2014–May 2017, n = 398**

|          |                |            |          |                              |               |
|----------|----------------|------------|----------|------------------------------|---------------|
| Mam, 176 | Q’anjob’al, 54 | K’iche, 47 | Chuj, 35 | ≤ 2% Achi, Awakateco, Ixi... | Akateko, 13   |
|          |                |            |          |                              | Q’eqchi, 11   |
|          |                |            |          | Popti, 25                    | Kaqchiquel, 8 |

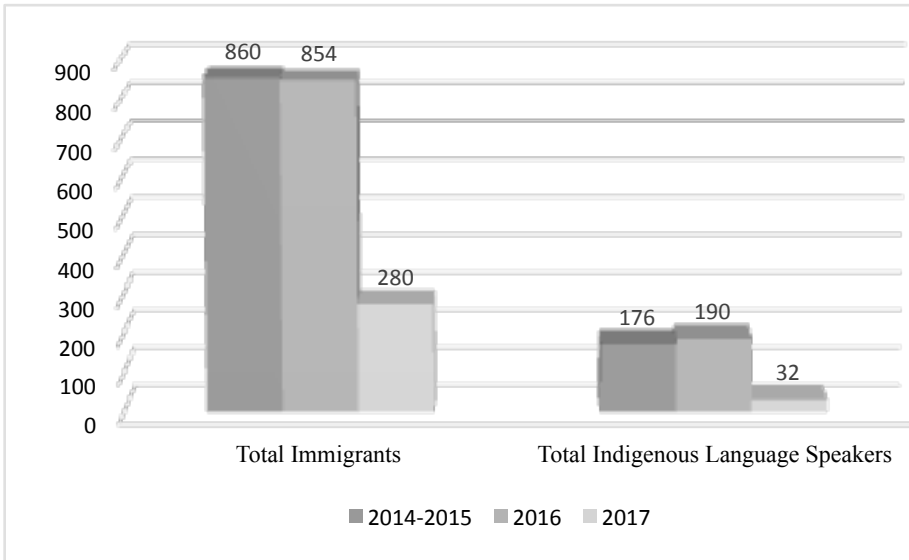
1. IMMIGRANT POPULATION TRENDS: 2014–2017

Figure 2 below shows a dramatic drop in sheltered immigrants for 2017 in the Tucson Sector CBP from 2014. The ratio of indigenous language speaking immigrants to nonindigenous language speaking immigrants changed from 20.4 percent of total immigrants being indigenous language speakers in 2014–2015, to 22 percent in 2016, and then dropped to 11 percent in 2017. Despite this composite data analysis for migrants sheltered in Arizona, the data is misleading as a snapshot of all sheltered indigenous language speakers in that period, border wide, given there is no other available data from CBP’s other sectors along the U.S. southern border.

Despite the declining trend, other border sectors in Texas and California anecdotally appeared to have seen relative increases in immigrant arrivals compared to Arizona crossings of immigrants in general, and indigenous language speakers in particular. Shifts in border sector arrests and subsequent releases to an interior immigration court have resulted in dramatic increases in the presence of indigenous language speakers in immigration court.

<sup>52</sup> *Id.*

**FIGURE 2: Total Immigrants vs. Indigenous Language–Speaking Immigrants Sheltered in Tuscon CBP Sector, Mid-July 2014–May 2017**



*2. DATA TREND FOR INDIGENOUS LANGUAGES SPOKEN NATIONALLY*

Three Indigenous Languages in Top 25 Initial Case Completions in FY 2016 could be a source for estimating the numbers of indigenous language speakers, but EOIR does not release such numbers, only their relative rankings. Guatemala ranked 2nd in asylum cases granted by U.S. immigration court in 2016 rising from thirteenth in 2012.<sup>53</sup> Those facts confirm Guatemala as a top asylum applicant country; a country where 60 percent of its population are indigenous.<sup>54</sup>

Nationally, three indigenous languages from Guatemala were ranked in the top 25 of initial case completions over fiscal years 2014–2016: Q’anjob’al [Kanjobal], Quiche, and Mam.<sup>55</sup> Their rise in ranking was unparalleled in that four-year period. By FY 2016, Q’anjob’al moved up to seventeenth place, Quiche to tenth place, and Mam surpassed

<sup>53</sup> U.S. Department of Justice, *supra* note 12, at L2.

<sup>54</sup> THE INDIGENOUS WORLD 2016 82 (Elaine Bolton trans., 2016), [https://www.iwgia.org/images/publications/0740\\_THE\\_INDIGENOUS\\_ORLD\\_2016\\_final\\_eb.pdf](https://www.iwgia.org/images/publications/0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf).

<sup>55</sup> U.S. Department of Justice, *supra* note 12, at E2.

Quiche in ninth place.<sup>56</sup> While Somali rose to tenth place by FY 2015, it then dropped by two ranks in FY 2016 to twelfth.<sup>57</sup>

Apart from Punjab, no other languages displayed sustained gains since 2012 compared to the Mayan Languages: Q'anjob'al, Quiche, and Mam.<sup>58</sup>

| Language   | Change in Rank |
|------------|----------------|
| Quiche:    | +14            |
| Somali:    | +13            |
| Q'anjob'al | +7             |
| Mam        |                |
| Punjab     |                |

### 3. ESTIMATED NATIONAL SCOPE OF GUATEMALAN INDIGENOUS LANGUAGE SPEAKERS

Guatemalans in FY 2016 presented 30,639 cases for 16.43 percent of all initial case completions. An unidentified portion of those 30,639 cases represent Kanjobal, Quiche, and Mam language speakers, in addition to other speakers of Mayan languages.<sup>59</sup> All three languages registered significant changes in rank from first entry to final position among the top twenty-five languages, and all are Mayan languages spoken in Western and Central Guatemala.

Common practices of documenting Spanish instead of identifying an immigrant's primary language in detention lead to undercounts in the actual number of speakers of indigenous languages. Undercounted indigenous language speakers are then scheduled into immigration court dockets. They added to the general backlog of 408,037 cases in 2014 which grew to 629,051 cases pending in 2017.<sup>60</sup> Given the average wait time for all immigrants in immigration court from 2014–2016 was 627 days,<sup>61</sup> their need for competent court-appointed interpretation further

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at D1.

<sup>60</sup> TRAC Immigration, *Figure 1. Pending Deportation Cases, FY 1998–FY2020*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php) (last visited March 22, 2020).

<sup>61</sup> TRAC Immigration, *Figure 1. Average Days Pending Cases Waiting, FY1998–FY2017*, [http://trac.syr.edu/phptools/immigration/court\\_backlog/apprep\\_backlog\\_avgdays.php](http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php) (last visited June 11, 2017).

lengthens their judicial process beyond the average wait period given structural barriers to indigenous language interpretation. The concentration of indigenous speakers in remote locales obscure the actual need for interpreters. Meanwhile, in urban centers, large language communities illuminate the need for interpreters. In both situations, however, attorneys and immigration courts lack access to trained interpreters.

Some attorneys have begun to view the denial of access to interpretation as a systemic problem, and not limited to individual clients they represent. Where indigenous speaking immigrants are quite observable is in the Family Detention Center at Karnes, Texas, or in private immigrant border shelters. The exposure of attorneys to the systemic nature of access denial led to their submission of a legal complaint with the Civil Rights Office of DHS, which documented gendered language discrimination.

Indigenous peoples are among Central America's most vulnerable, impoverished, and illiterate citizens. Indigenous women, in particular, have less access to education and are less likely to work outside the home than their male counterparts; as a consequence, indigenous women are less likely than indigenous men to be proficient in Spanish.

The U.S. government is obligated to ensure that indigenous language speakers have meaningful access to federal programs and activities.<sup>62</sup> CBP, ICE, and USCIS, in coordination with CRCL, have each developed their own individual plans to accommodate limited English proficient (LEP) individuals. Despite the existence of such plans, the Government Accountability Office criticized DHS's LEP engagement in 2010. To date, these agencies' LEP plans remain inadequate and the implementation of those plans, which do not even provide minimal protection for non-English speakers, remain incomplete.<sup>62</sup>

## CONCLUSION

### A. *Ideology of Language*

Practically speaking, interpretation and translation for immigrants in the U.S. immigration system are the end product of applied language

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<sup>62</sup> CARA Family Detention Pro Bono Project, *CLCR Complaint on Challenges Faced by Indigenous Language Speakers in Family Detention*, AILA Doc. No. 15121011. (Dec. 10, 2015), <https://www.aila.org/advo-media/press-releases/2015/crcl-complaint-challenges-faced-family-detention> (last visited Dec. 21, 2018).

policy. In 2016, the disparate gap between law, policy, and practice covering indigenous languages in the U.S. immigration system affected a conservatively estimated population over 29,000 LEP individuals who experienced daily the operational silos of DHS, DHHS, and DOJ.<sup>63</sup> Significantly, Mexican indigenous language speakers were not part of the estimate, and would significantly increase the estimate. DHS' operational silos provided an illusory implementation of hapless language protocols, at best.

This writing has demonstrated that at first contact three errors of language discrimination are committed; two by commission, one by omission. Immigrant indigenous language data at the Arizona border and nationally-estimated proxy data demonstrated that language exclusion affected a sizeable population, but validated national data is not forthcoming from the U.S. immigration system.

While operational error is a demonstrated end product of a language policy that discriminates against indigenous LEP individuals and their language communities in the United States, it begins at first contact for indigenous peoples at the border. After first contact at the border, the language bridges for indigenous peoples from Meso-America within the immigration system are systematically closed; only the occasional interpretation in immigration or criminal court briefly opens the gate, but they continue to speak their languages despite the silence they encounter in a labyrinth of immigration venues.

Indigenous language speakers experience exclusion in multiple due processes: whether at arrest, in criminal court, in longterm detention, in family detention, and or in child shelters, thus constituting large scale exclusion.

On the short road of language exclusion, if EOIR published public data on indigenous languages in final asylum cases, only partial transparency would be established, given final asylum hearings are at the terminal end of the system. Meaningful transparency requires language assessment data collection and reporting at first contact, and then language data transfer across points of contact throughout five agencies and three federal government departments in the system.

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<sup>63</sup> See GENTRY, *supra* note 13.

Only an integrated institutional approach can measure the gap between indigenous languages spoken vs. indigenous immigrants' access to language interpretation.

Yet, those measures are just an on-ramp to addressing the short road of indigenous language discrimination. In contrast, to overcome the long road of language discrimination, the obscured legacy of colonial and postcolonial language regimes must be engaged, for they are buried as the seeds of a discriminatory language ideology. As case law has demonstrated, U.S. colonial era practices of harsh language exclusion were never absolute. However, tellingly, indigenous nations legally recognized in the United States were once subject to legal termination (Termination Act of 1953) for a period of thirty-five years.<sup>64</sup>

In conclusion, it is the uncontested settler colonial linguistic legacy which masks the current indigenous social status in U.S. jurisprudence generally. That legacy serves as the jurisprudential foreground for indigenous discrimination in the immigration process, which is not merely a product of inconsistent and remotely mismanaged ad hoc policies governing patterns of indigenous language exclusion in the U.S. immigration system.<sup>65</sup> For legal professionals who do not receive preparation in language rights, sociolinguists, or interpretation law, being self-aware of that deficit can be understood in the stark terms that indigenous peoples experience. That deficit is reflected in daily practice, despite law and policy to the contrary. The colonial legacy resounds in the primordial experience of first contact. In fact, the conditions and provision for training canines (dogs) working with Customs and Border Patrol since 1993 are better regulated than the provision of indigenous languages for tens of thousands of indigenous language speaking immigrants.<sup>66</sup>

Without broader legal support for indigenous rights in legal settings generally, the profession of immigration attorneys in the United States has proven incapable of defending indigenous language rights specifically. In effect, indigenous language speakers are more often than not “terminated” in every instance of due process violations due to language exclusion.

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<sup>64</sup> House Concurrent Resolution 108 of 1953 (repudiated in 1983).

<sup>65</sup> ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES HISTORY OF THE UNITED STATES 173–75 (2015).

<sup>66</sup> *Canine Program History*, U.S. CUSTOMS AND BORDER PROTECTION, <https://www.cbp.gov/border-security/along-us-borders/canine-program/history-3> (last modified Jun. 3, 2014).

In contrast, Mexico—a nation with larger numbers of indigenous peoples—approved of federal legislation for indigenous language interpretation rights in federal courts, and is in the beginning stages of implementing indigenous language interpretation services.<sup>67</sup>

These undercurrents highlight a global reality where ongoing U.S. policy discriminates against indigenous language speaking immigrants, contrasting with legal protection in Mexican legal venues for Mexican indigenous languages. The long road to indigenous language discrimination requires that immigration law and policy look beyond its own jurisprudence and recognize the cultural and linguistic rights of indigenous peoples as set out in the United Nations Declaration of Rights of Indigenous Peoples in 2007 and their cultural rights in International Labor Organization's Resolution 169; principally the right to be identified separately and uniquely from Latino, Hispanic, mestizo, or any other national ethnicity with whom they have migrated to from their homelands. In all cases, their indigenous origins and the customary uses of their languages precede the nation states they left or entered. Their spoken languages all precede the doctrine of discovery.

A persistent assumption made by many majority language speakers is that only a single national language should be allowed in immigration venues. This idea is silently supported internally by the predominant operational culture in U.S. immigration venues and in the absence of strongly implemented nondiscriminatory language policies. Mexico is now facing a similar challenge with indigenous language speaking immigrants from Central America.

### **B. *Remaining Gaps in Language Policy***

Since the publication of *Indigenous Language Speaking Immigrants in the U.S. Immigration System*, limited progress had been made. EOIR contracted the Vera Institute of Justice to expand their Legal Orientation Program for longterm immigrant detainees in 2016. The Vera Institute of Justice produced audio recordings in five indigenous languages for use by nonprofit legal organizations nationally for delivery to longterm detainees. That approach theoretically offers legal orientation on par

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<sup>67</sup> COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, DERECHOS HUMANOS DE LOS MIGRANTES Y OTRAS PERSONAS EN EL CONTEXTO DE LA MOVILIDAD HUMANA EN MÉXICO 261 (2013), <http://www.oas.org/es/cidh/migrantes/docs/pdf/informe-migrantes-mexico-2013.pdf>.



with that offered to Spanish speaking detainees, albeit 27 years after Spanish speakers received orientations in Spanish in Florence, Arizona.<sup>68</sup>

However, wardens at immigrant detention centers in Arizona appear to determine if playback devices—necessary to present audio interpretation of legal orientation information—are allowed; the same legal information is presented in Spanish on a daily basis in the very same detention centers.

In March 2018, DOJ temporarily put a hold the Legal Orientation Program nationally, and then reversed itself and continued to allow access. There is still a dearth of public accountability for the language groups served, given there is no onsite public monitoring of its actual use in short-term and longterm adult detention, in children detention centers, in family detention centers, or the Migrant Protection Program's border asylum tent centers. Neither the Vera Institute of Justice nor EOIR publish quantified outcomes for indigenous languages. Both are subject to Executive Order 13166.

Reporting in the press about discriminatory language practices during immigration proceedings consistently supports the need for public monitoring and reporting of actual language utility.<sup>69</sup>

The DOJ in 2017 internally solicited a white paper on improvement of language services. A pilot indigenous language interpreters' training program from a private but highly qualified language contractor, was outlined in the delivered white paper. The documented rationale

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<sup>68</sup> See, for example, the Florence and Eloy Programs run by The Florence Immigrant and Refugee Aid Project (FIRRP) (<https://firrp.org/what/directservices/>) (last visited 28 April, 2018). Individuals who were identified as indigenous language speakers were less likely to receive a legal orientation session by The Florence Project because: (1) oral and visual presentations were in Spanish and were linguistically available only to Spanish Speakers, (2) priority was given to group settings in order to present the Know Your Rights Information in Spanish. Indigenous language speakers would then have to either advocate for the same information in their language, which no legal assistant or attorney spoke, or wait for the organization to decide to arrange for an interpreter, if at all. By 2016, the Vera Institute of Justice contracted for audio recordings in five Mayan Languages to be used in Legal Orientation Sessions for adults in long-term detention. The Florence Project's Legal Orientation Program was funded by the Vera Institute of Justice which was funded by EOIR, as were other Legal Orientation Programs funded in a like manner with other legal service providers nationally. The Vera Institute of Justice adopted the Florence Project's Legal Orientation Program as a national model. All are subject to Executive Order 13166.

<sup>69</sup> Roque Planas, *Winning Asylum Is Even Harder For Central Americans Who Don't Speak Spanish*, HUFFINGTON POST (Sept. 1, 2016), [https://www.huffingtonpost.com/entry/asylum-central-americans\\_us\\_57c85ebde4b0e60d31ddb9d9](https://www.huffingtonpost.com/entry/asylum-central-americans_us_57c85ebde4b0e60d31ddb9d9).

considered its use for apprehension and detention functions of the U.S. immigration system. After delivery, the proposal was never reviewed.<sup>70</sup>

For indigenous language speakers, by February 2018, assignation of federal responsibility of Executive Order 13166 to the DHS Office of Civil Rights and Civil Liberties reflects a Kafkaesque attempt to deflect each department's (and their sub-agencies') responsibility to implement the order. This office has proven itself ineffective at handling even general legal discrimination complaints (its main mission), let alone the complex enforcement of a unified languages program across three DHS agencies: CBP, BP, and ICE.<sup>71</sup>

A toll-free number established by DHS outside the confines of detention with only three available languages—English, Spanish, or Arabic—does not provide indigenous language speaking immigrants with access. It is, however, symbolic of their rather pedestrian and racist attempt to promote the appearance of access.

The issue of indigenous language discrimination is time and again raised in public for individual cases but never for the class of indigenous language speakers within the system as a whole. Eight hours after his first contact with Border Patrol, the death of a Q'eqchi speaking seven-year-old, Jakelin Caal, occurred on December 7, 2018 while her father was in custody of CBP officers.<sup>72</sup> In this and other cases, it is an open question if the muted language practice of CBP is due to institutional neglect, or is actually maintained as another tactic in the U.S.

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<sup>70</sup> See GENTRY, *supra* note 13.

<sup>71</sup> U.S. DEPARTMENT OF HOMELAND SECURITY, LANGUAGE ACCESS PLAN (Feb. 28, 2012), <https://www.dhs.gov/sites/default/files/publications/crcl-dhs-language-access-plan.pdf>. This program was launched by the Department of Homeland Security (DHS) to develop standards for language services and to coordinate the implementation of Executive Order 13166 throughout its agencies (CBP, BP and ICE, etc.). DHS instructs its agencies to use extant FBI and DOD language in interpretation services. It does not specify what standards it will include; whether indigenous languages assessments, an overall reporting timeline, or publicly reported data on languages requested and delivered. The Office of Civil Rights and Civil Liberties has in the past not demonstrated the capacity to process or respond to an enormous backlog of complaints about immigration matters. This office has previously demonstrated little capacity to wield policy change within the agency, where operational Chiefs answer to the agency and not DHS directly.

<sup>72</sup> Nick Miroff & Robert Moore, *7-year-old migrant girl taken into Border Patrol custody dies of dehydration, exhaustion*, WASHINGTON POST (Dec. 13, 2018), [https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199\\_story.html?utm\\_term=.e6df251f9499](https://www.washingtonpost.com/world/national-security/7-year-old-migrant-girl-taken-into-border-patrol-custody-dies-of-dehydration-exhaustion/2018/12/13/8909e356-ff03-11e8-862a-b6a6f3ce8199_story.html?utm_term=.e6df251f9499).

immigration deterrence strategy. There has been a lack of investigation as to the causes of similar deaths:

“. . . joint congressional letter signed by 17 members of Congress, an additional letter from Senator Warren, statements from national and international committees and organizations such as the United States Coalition against Corruption and Impunity in Guatemala, and the Inter-American Commission of Human Rights, all demanding an explanation and a full accounting for the causes and circumstances of the deaths of [five] Maya children, the U.S. Government has not conducted an exhaustive and transparent investigation or made any findings public, and not held anyone accountable concerning the deaths of children at the border.”<sup>73</sup>

Due to a hollow implementation and the obfuscation of public accountability, Executive Order 13166 has failed to protect LEP indigenous language speaking immigrants as a particular vulnerable class of immigrants in the U.S. immigration system from legal discrimination. Without active safeguard polices to implement protections for indigenous language rights, authorities in DHS and DOJ who oversee linguistically uninformed agencies provide policy cover for a wholesale denial of indigenous language rights. The future implication for the legal community is that indigenous language speakers will remain invisible and inaudible subjects. The status quo is a *de facto* discriminatory language policy that rewards an enforcement regime, but denies due process.

In contrast, while the LGBTQ community has struggled mightily and gained exemplary allies in the defense against attacks on their gender rights in immigration settings, indigenous peoples remain largely on their own. There has been little public interest from the legal community in litigating the rights of indigenous language speakers.

Left unexamined in this inquiry, for example, is the confluence of ICE and local law enforcement under the 2013 revised 287-G program,<sup>74</sup> and the applicability of Title VI to states that receive and distribute

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<sup>73</sup> *Hold the United States Accountable for Violating the Rights of all Asylum Seekers, Particularly Indigenous Peoples Migrating to the U.S.*, INTERNATIONAL MAYAN LEAGUE (Dec. 10, 2019). See also PATRISIA GONZALEZ, JUANITA LOPEZ & RACHEL STARKS, INDIGENOUS PEOPLES' RIGHTS TO EXIST, SELF DETERMINATION, LANGUAGE AND DUE PROCESS IN MIGRATION 3–4 (2020).

<sup>74</sup> See *Updated Facts on ICE's 287(g) Program*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/factsheets/287g-reform> (last updated Jan. 10, 2018).

federal funds under 287-G for state Homeland Security programs and participate in 287-G efforts—states where provisions are not made for indigenous language interpretation. Where federal-local partnerships are established, Title VI antidiscrimination principles apply.

Most recently, publicly inaccessible “Asylum Tents” were erected throughout 2019 to enforce asylum metering at the border. This practice was authorized under the euphemistically named United States’ Migrant Protection Program. This program forced 63,007 asylum seekers, of which 20,741 were minors, to wait for due process in highly risky Mexican border towns like Tijuana, Nogales, Juarez, Nuevo Laredo, Reynosa, and Matamoros.<sup>75</sup> This metering further exemplifies denial of indigenous language rights.

Past exclusionary practices under the Obama administration and previous administrations required no forethought of malice, only negligence. Negligence is deeply rooted in historical miseducation about indigenous peoples and their presumed assimilation into the national cultural fabric; a fabric from which the legal community is also clothed. Current exclusionary practices, however, appear purposeful and build on past patterns of discrimination. In both contexts, indigenous peoples remain hidden in plain sight; assumed by many Border Patrol agents and officers of the court alike to be Latino or Hispanic, not indigenous peoples with their own history, culture, and languages. Indigenous language speakers painfully remain as silent subjects in an immigration system that literally does not hear them.

The magnitude of discrimination is “discoverable” only when indigenous language speakers are appraised of their right to speak in their primary language at first contact. Indigenous peoples must be recognized racially, in gender specific terms, and by language and dialect if equitable treatment is to be constructed.

Speakers of indigenous languages can only gain access to jurisprudence if language assessment data is collected in subsequent immigration venues.

*O’odham Niok?* Do you speak O’odham?

Language is the blood that circulates our culture.

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<sup>75</sup> Fabiola Martínez, *México, la antesala de 63 mil migrantes en espera de asilo en EU*, LA JORNADA, <https://www.jornada.com.mx/sin-fronteras/2020/02/02/mexico-la-antesala-de-63-mil-migrantes-en-espera-de-asilo-en-eu-4860.html> (last visited Feb. 2, 2020).

